

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1148

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

v. :

Docket No. 77-1148

WILLIAM JAMES MILLER :

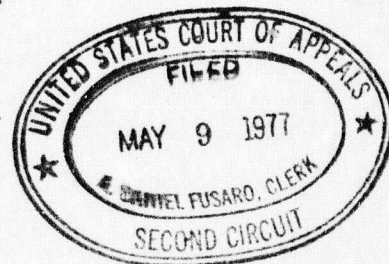
APPELLANT. :

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P/s*

BRIEF FOR APPELLANT WILLIAM JAMES MILLER

Appeal From A Judgment Of
Conviction In the United
States District Court For
The Eastern District Of
New York.



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BRIEF FOR APPELLANT WILLIAM JAMES MILLER

William James (Billy) Miller appeals from his conviction on February 4, 1977 in the United States District Court for the Eastern District of New York (Costantino, J.) upon a jury verdict of conspiring to manufacture, possess and distribute phencyclidine (PCP), which on the street they call angel dust. 21 U.S.C. 841 (a) (1), 846. The confinement part of his two year sentence was two months, with in addition five years probation and two years special parole. Counsel on this appeal is assigned under the C.J.A.

James Korzeniewski was tried and convicted with Miller. His appeal is being prosecuted jointly with this one.

ISSUES PRESENTED FOR REVIEW

The principal issue of this appeal is whether the credibility of the Government's witnesses was improperly bolstered by a series of district court actions. These actions were also errors in themselves and consisted of the following:

1. A direction to the jury that the evidence showed an illegal conspiracy, thereby removing essential elements of the crime from its consideration.
2. Permitting a crucial Government witness, whose credibility was in doubt, to testify in his Air Force uniform.
3. Permitting the Government's chemist to testify as an ordinary witness, rather than an expert, when he had no competence to give such testimony. And
4. Making premature rulings under United States v. Geany, and stating in the course thereof to the jury that it agreed that Miller had joined the conspiracy.

STATEMENT OF FACTS

The basic issue at trial was credibility. Robert Kuzniewski and Joseph Palminteri organized and conducted the angel dust enterprize, but by the trial had made their peace with the Government (22, 179)* and were prepared to describe its extensive details and to implicate Miller and Korzeniewski, who, they said, made two purchases for very small money. Miller and Korzeniewski both testified and denied any involvement.

The Kuzniewski-Palminteri-Janusez Partnership

Angel dust is made from common industrial chemicals (28-29). When placed on mint leaves, which in turn are rolled into cigarettes, it produces the effects those smoking these substances apparently seek (35).

Robert Kuzniewski majored in Chemistry for two years at Queens College. By 1975 he was a dropout, unemployed (21) and without steady means to sustain himself except that he did know how to manufacture PCP and with a negligible investment for the chemicals could make \$900 to \$1,000 for each pound he produced. In June 1975 he formed a partnership with Joseph Palminteri

* Numbered references without more, are to the trial transcript. A denotes the Joint Appendix.

Our Statement of Facts takes the evidence most favorable to the Government.

and Mark Janusez to produce and distribute PCP (36). Palminteri helped obtain the chemicals and was the comptroller and accountant for the enterprize (180). Janusez helped obtain chemicals (37) and allegedly brought Miller, who was his friend, into contact with his partners (182).

In late July, 1975, at a meeting with Palminteri and Janusez, Miller said that he was interested in buying PCP (184), and that Korzeniewski was his partner (186). Palminteri quoted a price of \$1,000 a pound, Miller asked that it be lower, and Palminteri agreed (187). Palminteri placed Kuzniewski at the meeting (184). Kuzniewski's testimony was contrary (38).

Sometime after, Janusez told Palminteri that he would be responsible for giving the angel dust to Miller and Korzeniewski (188,198); and Kuzniewski said that he would be responsible for mixing the angel dust on mint leaves for them. Neither Miller nor Korzeniewski was present when these statements were made,* nor when Janusez told Palminteri that they had received \$700 from Miller (207-08) and how it had been split (211-13).

In August, Miller asked for and obtained information from Kuzniewski on where to obtain mint leaves and instructions on how to make an angel dust cigarette (38 - 39). He then paid Kuzniewski and Palminteri each \$200 (46, 215). Later Kuzniewski

* The Government brought these out, as well as another from Kuzniewski that he had mixed angel dust for Miller (201), through Palminteri.

observed five or six ounces in the trunk of Miller's car, as well as a small double beam scale (40).

The November Sale

In November 1975 Kuzniewski gave Miller another pound (42-43). Miller paid him \$150 (47). Once, Kuzniewski saw Miller making out ounce bags on a scale (44). Miller said he was selling nickel bags (46). Again, the district court admitted statements between Palminteri and his partners, outside of Miller's presence, as to payments and splits (217-18).

Indictment and Trial

In May 1976 the Government filed indictment 76 CR 331 charging Palminteri, Janusez, Miller, Korzeniewski and several others with conspiracy to violate title 21 (A 5). By the trial in October a disposition had been reached with all the defendants except Miller and Korzeniewski. Kuzniewski was then in the air force, and wore his uniform while he testified (21). After defendants cross-examined Palminteri, the Government was permitted to introduce as a prior consistent statement (438) his notebook around the time in question showing two sales to "Billy", whom he identified as Miller, for \$1,000/pound (443).

The Government's chemist expressed the opinion based on Kuzniewski's testimony that the chemical he had made was phencyclidine (493). He was also permitted to testify, however,

that he had discussed the synthesis of PCP with Kuzniewski and that based on those discussions he felt Kuzniewski knew how to make the drug (A 46).

Miller and Korzeniewski both testified and denied the purchases attributed to them. Miller in addition, had testimony from a Robert Higgins contradicting Kuzniewski's assertion that he (Higgins) also had been involved and stating that as far as he knew Miller was not into angel dust either (515-17). Similar testimony came from James Gluck (564). The Government in turn produced a rebuttal witness to contradict Higgins' protest of his innocence (664).

At an early point in the trial (the district court having heard only the testimony of Kuzniewski) it instructed the jury that the Kuzniewski scheme to make and sell PCP "was illegal" and that there was "No question about it." The only issue for the jury, according to the court, was "whether these two gentlemen sitting here had anything to do with it." (A 44).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN REMOVING THE EXISTENCE OF THE CONSPIRACY FROM THE JURY, IN PERMITTING KUZNIEWSKI TO WEAR HIS AIR FORCE UNIFORM, IN PERMITTING THE EXPERT TO TESTIFY IN AN AREA WHERE HE WAS NOT A COMPETENT WITNESS, AND IN FAILING TO COMPLY WITH GEANY STANDARDS IN RULING ON CO-CONSPIRATOR STATEMENTS.

The district court committed error in four respects, the cumulative effect of which was to deny Miller a fair trial, and which require reversal. All are important not only as errors in themselves but because they aided the Government in bolstering the credibility of Kuzniewski and Palminteri -- when their credibility was the crucial issue in the case.

First, the district court was clearly wrong in instructing the jury at the outset of the case that there was a conspiracy, that the conspiracy was illegal and that the sole issue was whether the trial defendants joined it (A 44). Only the jury could decide if the Government proved its case, and this encompassed every element of the crime charged, including whether the drug in question was indeed phencyclidine, whether it was made for distribution, whether Kuzniewski really had a partnership and so forth. The court's instructions took these elements from the jury and left only the question of defendant's agreement to join. At the same time it improperly bolstered the Government's case on that agreement by directing the jury to accept Kuzniewski and Palminteri on the fact that a conspiracy existed.

This error, United States v. Clark, 475 F. 2d 240, 248 (2d Cir. 1973) (reversal where jury has been "confused" or left with an "erroneous impression" on essential elements of the crime), United States v. Fields, 466 F. 2d 119 (2d Cir. 1972) (every element must be submitted), was not saved by stipulation of defense counsel (A 45), or the formal charge. The district court compelled the former without any right to or justification for doing so; and the formal charge in general terms at the end of the case could not erase the earlier instruction taking elements from the jury's consideration, even if it had purported to do so, which it didn't. United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965) (reverse where jury confused on essential element even when that element was covered in other parts of the charge).

Second, the district court was clearly wrong in permitting the Government chemist to testify that Kuzniewski knew how to make PCP. As one who had no other involvement with the case, the witness could testify only about the product, that is whether as described in testimony, it was or was not PCP. His right to render an expert opinion went no further than that. F.R. Evid. 701

Once he talked about Kuzniewski and his abilities -- as distinguished from a neutrally described product -- he became an ordinary witness giving non-expert testimony about the facts in controversy. However this testimony was plainly incompetent. F.R. Evid 602. It served doubly to harm defendants by again bolstering Kuzniewski's credibility.

Third, the district court erred in permitting Kuzniewski to wear his Air Force uniform while testifying. The uniform told

the jury that although he might have erred in the past, Kuzniewski had repented and was now telling the truth, as evidenced by the United States Government having accepted him into the Air Force. Thus the prosecutor cleverly but improperly brought the weight of the Armed Forces in support of Kuzniewski's credibility. See La Rocca v. Lane, 37 N.Y. 2d 575 (1975) (priest may not appear in clerical garb when acting as attorney); ABA, Standards Relating to the Prosecution Function, Sec. 5.18 (unprofessional conduct for prosecutor to express personal belief in credibility of his witness).

Finally, the district erred in ruling on statements of alleged co-conspirators outside defendants' presence. F.R. Evid 801 (d) (2) (E). These first came in when the only non-hearsay evidence as to Miller's participation at that point in time was Palminteri's testimony that he and Miller had negotiated about price. In the first place the district court made final rulings then, rather than as United States v. Geany, 417 F. 2d 1116, 1120 (2d Cir. 1969) commands, "when all the evidence is in." See also United States v. Trotter, 529 F. 2d 806, 811-12 (3d Cir. 1976); United States v. Glazer, 532 F. 2d 224, 228-29 (2d Cir. 1976); United States v. Wiley, 519 F. 2d 1348 (2d Cir. 1975). In the second, the court stated before the jury that it accepted the Government's position that "we have a conspiracy already" (A 47), vouching for the credibility of the Government's witnesses. Lastly, it failed to apply a discriminating

analysis which could have resulted in limiting instructions. We doubt, for example, that that and later testimony was admissible against Korzeniewski since he spoke nothing at the meeting negotiating price and was implicated only by ambiguous silence.

CONCLUSION

In what was otherwise a simple case, the jury deliberated from afternoon until late in the evening one day (799) and through most of a second (806), obviously doubting the credibility of Kuzniewski and Palminteri and asking to re-hear testimony of the Government's deals with those two (779). Miller was entitled to a consideration of that credibility free from the errors which improperly weighted the issue in the Government's favor. The judgement below should be reversed, and a new trial ordered.*

Respectfully Submitted,

Donald E. Nawi, Esq.
Attorney for Appellant
Billy Miller

* We rely in addition on any points raised by the co-appellant.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief for Appellant William James Miller and Joint Appendix on the United States Attorney for the Eastern District of New York by mailing a copy of same to him at 225 Cadman Plaza East, Brooklyn, N.Y. this 9th day of May 1977. I am a member of the bar of this Court.

Ronald E. Traw

